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No. 88-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MANSION HOUSE CENTER NORTH REDEVELOPMENT COMPANY, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

MEMORANDUM FOR PETITIONERS IN REPLY

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Respondent incorrectly implies that the December, 1985 district court judgment incorporated the stipulation of the parties regarding the foreclosure of both realty and personalty securing the loan to petitioners. The court's memorandum opinion incorporates by reference in a prefatory paragraph the pleadings, documents in evidence and stipulations of the parties as the basis for the Court's judgment, but nowhere does the Court adopt the parties' stipulations as the Court's ruling.

> The Court having considered the pleadings, the documents in evidence, and the stipulations of the parties which are incorporated herein by reference, and being fully advised

> in the premises, hereby makes the *following* findings of fact and conclusions of law, as required by Rule 52 of the Federal Rules of Civil Procedure.

Pet. App. A-6 (emphasis added).

The Court's only finding based upon the parties' stipulations was that HUD's decision to foreclose was consistent with national housing objectives (Pet. App. A-8). Respondent cannot overcome the complete absence of any order concerning the foreclosure of the personalty. In fact, even the district court recognized that respondent's motion to supplement the judgment to foreclose the personalty (filed thirteen months after the December 1985 judgment and after the judgment was affirmed on appeal) was a request for "additional relief". (Pet. App. A-14). If the district court had intended to foreclose petitioners' interests in the personalty in its December 1985 order, the court would not have characterized respondent's motion as a request for "additional relief". The simple answer is that the district court did not intend to reach the issue of petitioners' security interest in the personalty in its December 1985 order. Therefore, a motion under Fed. R. Civ. P. 60(a) to make the judgment conform to what was intended would not lie.

The cases respondent cites for the proposition that the district court has the power to award additional relief contemplated at the time judgment was entered are typical examples of "clerical errors" remediable under Rule 60(a), such as where the court erred mathematically in computing damages or omitted relief mandated by statute. None of these cases deals with a substantive change in a judgment, which occurred here. The district court lacks power to effect such changes under Rule 60(a). "Errors that affect substantial rights of the parties, however, are beyond the scope of Rule 60(a)." *Mullins v. Nickel Plate Mining Co.*, 691 F. 2d 971, 973 (11th Cir. 1982).

The situation presented in this case is identical to that facing the Fifth Circuit in *Willie v. Continental Oil Co.*, 746 F. 2d

1041, *vacated,* 760 F. 2d 87 (1985), *appeal dismissed,* 754 F. 2d 706 (5th Cir. 1986), where the court was asked to open up a judgment under Rule 60(a) to conform the judgment to the parties' pretrial stipulation. Respondent attempts to distinguish *Willie* on the grounds that in *Willie* the court was doing something other than what it originally intended, whereas in the present case the court was merely making the judgment conform to what it originally intended.

In *Willie,* 746 F. 2d at 1045, the Fifth Circuit held that the trial court could not act pursuant to Rule 60(a) because the rule was designed to correct clerical or amanuensis-type mistakes, and not errors of substantive judgment or errors that determine substantive rights of the parties. Although the Fifth Circuit eventually vacated and dismissed the appeal in *Willie,* the court's order dismissing the appeal clearly by implication held that the relief sought (to amend the judgment to conform to the parties' stipulation) was *not* available under Rule 60(a). *See Willie,* 784 F. 2d at 707. As noted above, the district court in the present case did *not* adopt the parties' stipulations as part of its judgment, and when later faced with a motion to conform the judgment to the stipulation, deemed such motion a request for "additional relief." *Willie* is thus entirely inconsistent with the result reached by the district court here.

Finally, the mandate rule bars the relief granted by the district court in this action. Respondent appears to argue that because the cases cited by petitioners are not of recent vintage they should be ignored, even though respondent does not dispute that these cases are in conflict with the position taken by the Eighth Circuit in the present action. Respondent further incorrectly contends that *Standard Oil Co. v. United States,* 429 U.S. 17, 19 (1976) (per curiam), is dispositive.

The jurisdiction of the district court to act under Rule 60(a) after issuance of the appellate court's mandate has never been decided by this Court. The only courts squarely facing this issue

have decided that the district court has no jurisdiction to act. *Standard Oil* merely abolished the judicially created appellate-leave requirement for filing Rule 60(b) motions after the appeal had been docketed. Unlike the Rule 60(b) situation requiring the opening of a judgment after the discovery of new evidence or to rectify matters occurring after trial, Rule 60(a) exists to correct clerical errors not affecting the substantive rights of the parties. Allowing the district court to act pursuant to Rule 60(a) after the issuance of the mandate makes no sense because the judgment merges in the mandate. The district court has no jurisdiction to alter or amend the mandate. Its jurisdiction is limited to executing the mandate according to its terms. The district court had no jurisdiction in the present case to act.

Petitioners therefore respectfully request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

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